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A Moral Theory of Property

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A MORAL THEORY OF PROPERTY

By Laura S. Underkuffler[†]

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I. INTRODUCTION

Peter Gerhart's book begins: "This [book] . . . develops a theory of social morality and property."¹

Immediately, this book has our attention. It is rare to encounter a contemporary work of property theory that places the moral question at center stage. Most contemporary property scholarship works to articulate reasons and rules for our private property regime that make little reference to the idea of moral obligations to others. For instance, there is the effort to emphasize the role of efficiency as the *raison d'être* for private property and the rules that govern property forms and transactions. Or, there are efforts to shape property rules in a way that protects expectations, and promotes certainty and order. In most contemporary American property theory, moral questions are remote side-constraints, if considered at all. Certainly, they are not the center of analysis.

Gerhart ignores this skepticism about the role of social morality in property theory. In this highly provocative and theoretically rich work, he rejects the idea that questions of morality and the design of property rules are at odds, in either their intentions or their roots. It is true, Gerhart acknowledges, that property and morality are potential antagonists, because property—in its ordinary meaning—seeks to protect individual interests, and morality—as a limitation on property rights—does not. However, Gerhart argues, there is more that can be found in property rights than this. It is possible, in his view, to articulate a theory that explains not only why property rights are what they are, but also how and why they must be limited by the well-being of other individuals. Property involves values that protect owners, but also creates obligations to others. Property reflects "a system of moral action."² It describes—itsself, and through the values that it embodies—what and when "we owe each other."³

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1. PETER M. GERHART, *PROPERTY LAW AND SOCIAL MORALITY* 1 (Cambridge Univ. Press 2013).

2. *Id.* at 3.

3. *See id.* at 4.

So—what, and why, do property owners owe? The answer, Gerhart writes, can be found in an analogy to tort. Property owners—like other private parties—incur obligations to others through their actions, and the harm to others that their actions create. “Duties are imposed because they are the natural consequences of choices [that] people make.”⁴ If a property owner exercises his right—for instance, his right to use his land—in a way that harms another, he is responsible—as a tortfeasor is responsible—for the redress of that wrong. If another takes action that pollutes others, or endangers the shoreline property of others, or destroys animal species that others value, his reliance on “the rights of property” will not answer the moral question. Rather, he is morally bound—by principles of equal freedom, and required reciprocity—to acknowledge his infringement of the rights of others. A property owner, Gerhart writes, has no obligation to others until he acts; but once he does, he is liable—just as anyone else is liable—for the consequences of his choice.

Gerhart’s theory of “property as tort” is simple, bold, and intuitively compelling. Just as actions that an individual voluntarily undertakes can impose moral obligations in tort, so actions that an individual voluntarily undertakes can impose moral obligations in property. Finally, we have a simple, understandable basis on which other-regarding obligations can be imposed upon property owners, for the externalities that they cause.

But does it capture all that is involved in the ownership of property? Put another way, does Gerhart reckon with all of the implications of his theory in the complex world of property ownership?

II. A MORAL THEORY OF PROPERTY

Property theory has long been vexed by a latent but fundamental issue. If property—as commonly understood—is concerned with protection, and protection only, what do we do with property rights vis-à-vis third parties? Does property theory have anything coherent to say about the duties or obligations of property holders to others?

The problem can perhaps be best illustrated this way. As lawyers and legal scholars, we are all familiar with the reasons that property rights might be conferred on a particular individual. Depending on the property-related values one chooses, that individual could be awarded property rights (for instance) as a reward for labor, or in recognition of his possession of things, or for personal reasons such as his need for security or ability to exercise his will in the material world. The reasons for recognition of property rights are various, and often conflicting; for instance, which should trump—an individual desert-based labor theory, or the idea of inheritance? However, all of these reasons have one characteristic in common: they are concerned with

4. *Id.* at 167.

whether that individual should be afforded particular rights, from a societal point of view.

Missing from this picture is the question of the property owner's responsibilities to others. Obviously, there is incidental adjudication of conflicting claims: if we award a resource to one person, under a labor theory of property, we are not awarding it to another. But once the resource has been awarded to someone, there is generally nothing—generated by the operative theories of property, as just described—that addresses the question of duties or obligations thereafter to others. If an individual is awarded particular property rights as a reward for labor, or for reasons of efficiency, or to enable the exercise of his “will,” does he thereafter have duties or obligations to others? We might think of simple ideas of nuisance—that one cannot use his property in a way that injures the enjoyment of property by another. But this idea is ill-formed and partial at best. It does not deal with the question of how, or whether, “each [property-owning] individual is charged with responsibility to account for the interests of others in a morally appropriate way.”⁵

It is into this void that Gerhart's book steps. The aspiration of this book is not to impose upon the property regime some unrelated theory of justice, which—Gerhart fears—will be difficult to defend. A methodological approach in which “the clashing . . . interests or values” of others are pitted against those of the property owner creates familiar, and potentially insuperable problems.⁶ How should we compare incommensurables such as an outsider's interest in access, and an owner's interest in keeping someone out?⁷ Rather, what is needed is a theory of obligations to others that utilizes the values and ideas that we have already accepted in the establishment of property rights themselves. We need a theory in which “an owner's obligations and disabilities . . . flow from the same source that gave rise to the rights in the first place.”⁸ If incentives (or autonomy or personhood) are the values that gave rise to the property rights, then it is within those same values that we must find property rights' limitations.⁹

So—how might this be done? Gerhart begins with the idea of “social recognition”—that is, “[o]wners' decisions are constrained because of an owner's rights depend on the community's acceptance of the claims, and acceptance is conditioned on owners meeting socially valued norms of behavior.”¹⁰ So far, the terrain is noncontroversial. As long as we are constructing our system of property within an or-

5. *Id.* at 12.

6. See GERHART, *supra* note 1, at 11.

7. See *id.*

8. *Id.* at 11.

9. See *id.* at 10–11.

10. *Id.* at 13.

ganized society, all individual actions must be in accordance with societal norms (whatever they might be).

Next, Gerhart takes a step that involves more theoretical risk. This is the extension of property rights to include obligations. Property rights, Gerhart writes, have some component of “due regard to the interests of others.”¹¹ This can be expressed, in shorthand form, as “obligations” to others. To explain, “[a]n owner has authority to make a wide variety of decisions about a resource, but only if her behavior reflects decisions that take into account, in an appropriate way, the interest and well-being of individuals toward whom the owner has an obligation.”¹²

At this point, we must pause. How does ownership of property, itself, generate obligations to others? One could presumably own property—under any of the theories listed above—and be subject to no obligations to anyone. Once we assume that the owner has obligations, of any sort, haven’t we assumed the importation of some other, non-property, incommensurable social value—the very thing that Gerhart’s theory is aiming to avoid?

Gerhart acknowledges the importation of one external value, but one only—that is the “principle of equality.”¹³ “The foundational principle animating the theory here,” he writes, “as is true for most moral theory, is the principle of equal freedom.” “[I]n all dealings between individuals or between individuals and the state, each individual is entitled to respect equal to the respect given to every other individual.”¹⁴

This is certainly a value that is external to the property regime. The idea of equal freedom or equal regard is not a value that gives rise to private property rights; indeed, the fundamental idea that private property bestows rights on some, and not on others, seems to cut against this value. Thus, Gerhart has—with this step—arguably deviated from his objective, which is to find within the values that give rise to property rights those values that impose limitations.

However, to give too much credence to this objection would be to shortchange Gerhart’s theory and the contribution that it ultimately makes. Perhaps it is best to deal with this issue, at this point, by accepting the explanation that Gerhart gives: that the importation of the principle of equality can be justified, or forgiven at least, due to its unquestionably foundational role in a liberal democratic society.¹⁵

In any event, Gerhart intends but a limited role for the principle of equality. The kind of equality that he envisions is the kind that we

11. See GERHART, *supra* note 1, at 14.

12. *Id.*

13. See *id.* at 20.

14. *Id.* (footnote omitted).

15. See *id.* at 20-21.

find in tort law: equal freedom from injury, or—as he explains it, in property terms—equal freedom from interference with autonomy.

Property's core value, in Gerhart's view, is the value of autonomy. Private law, including property law, "sees each person as an autonomous actor, fully endowed with the freedom to make decisions that do not positively interfere with the projects and preferences of others."¹⁶ Thus, in property law—as in tort law—autonomy is combined with (in a sense) equal freedom. The core value of property, that of autonomous action, is protected until it collides with the (equal) autonomous interests of others. When a property owner acts in such a way, a limitation is imposed. In property ownership, "individual freedom [to act must be maximized] consistent with the equal freedom of other[s]."¹⁷

The conception of property and its limitations that Gerhart's theory advances mirror the idea of tortious conduct. Just as tort duties flow from actions that an individual takes, so it is true in property. Obligations to others—"moral" constraints—flow from an individual's activity decisions. Because the owner has voluntarily taken these actions, we can rightfully infer that the owner—under the equality principle—agrees to the consequences of those actions, and the need for his actions to respect the autonomy of others.

To summarize this important point, under Gerhart's theory "an individual's obligations come from a decision that the individual has made."¹⁸ As in tort, "[r]esponsibility . . . flows from an individual's activity decisions," and her responsibility—under the principle of equal freedom—to appropriately account for the equal freedom of others.¹⁹ In the property context, an owner's obligation to take into account the autonomy interests of others might flow from the owner's purchase of particular property, or his use of it.²⁰ In such a case, "repairing harm is a central part of that activity."²¹

This formulation, of course, leaves a critical question unanswered. The theory states that "each individual [property owner] may choose his goals and means of reaching those goals, subject only to the equal freedom of . . . other individual[s]."²² Put another way, each owner must "exercise her freedom in a way that appropriately accounts for the equal freedom of others."²³ The question remains: what is "appropriate" respect for others?

Gerhart discusses the meaning of this in several settings. He describes "two categories of responsibility—the responsibility of due

16. GERHART, *supra* note 1, at 121.

17. *See id.* at 145.

18. *Id.* at 122.

19. *See id.* at 142.

20. *See id.* at 123.

21. GERHART, *supra* note 1, at 142.

22. *Id.* at 143.

23. *Id.*

care and the responsibility of reasonable repair.”²⁴ Both are rooted in familiar tort concepts. The responsibility of due care is relatively simple: if the harm can be avoided by one of the parties at a reasonable cost, “the party who can avoid the harm should do so.” “But responsibility ends at the point where due care is taken, and losses beyond that point fall on the victim.”²⁵ Cases of the second kind are more complex. The responsibility to reasonably repair arises, if at all, in cases in which society has decided, despite the injurer’s due care, that the loss should nonetheless fall on him. For instance, in the tort context, responsibility might be imposed under ideas of strict liability or unjust enrichment.²⁶

The important and consistent point is that “[d]uties are imposed because they are the natural consequences of choices people make [. . . a] principle [that] is well-developed in tort law.”²⁷ Just as the driver of a car “surrenders decision-making autonomy by the very decision to subject others to . . . risks” through his driving, and the supplier of goods and services “surrender[s] decision-making autonomy and accepts the obligation to think reasonably about the well-being of those the supplier serves,” so it works in property law.²⁸ If “an owner uses his property to erect a steel mill, the obligation to think about the well-being of others is fairly implied from the owner’s knowledge that the steel mill will . . . pollut[e]” others.²⁹ Similarly, an owner’s decision to house migrant workers on his farm can be said to fairly imply that he has a duty to allow helping professionals to have reasonable access to them.³⁰ Absent action from which a duty can be implied, the owner is absolved of any obligation to others.³¹ As Gerhart writes, “[t]here is no balancing of interests until . . . the owner has accepted the well-being of non-owners as part of the owner’s projects and preferences. Duty does not arise from the fact that [the interference with the owner’s rights that is sought] is very important to the non-owner.”³²

If a “moral theory of property” means one that articulates an owner’s obligation to others, then this book is successful in its objective. The idea that duties to others arise from a property owner’s actions is a simple, clear, and appealing one. It makes intuitive sense that if a property owner acts to injure the interests of others, he should (under an analogy to tort rules) be liable for the harm that his

24. *Id.*

25. *Id.* at 145.

26. See GERHART, *supra* note 1, at 147–49.

27. *Id.* at 167.

28. See *id.* at 167.

29. *Id.* at 167.

30. See *id.* at 170.

31. See GERHART, *supra* note 1, at 168–72.

32. *Id.* at 175.

actions cause. Indeed, that insight is verified by the universally accepted claim for nuisance.

Furthermore, and most importantly, the implications of Gerhart's theory are not trivial. Many of us, as property theorists, have struggled with a response to property-rights advocates who set up the following syllogism: "property rights to use, transfer, exclude, and so on are rights." "Thus, they are presumed—by definition—to trump non-rights (societal) interests." As a result of this syllogism, it has been difficult to argue, as a theoretical matter, that this presumption should fail—in some cases at least. Theorists have attempted to combat this with arguments about the nature of rights;³³ the interrelatedness of property claims and rights;³⁴ a redefinition of property rights;³⁵ historical understandings of property rights;³⁶ and others. But the problem has persisted. How can property rights be so easily trumped by societal concerns, as we often argue?

Now we have a different and powerful entrant into the picture. Under Gerhart's theory, property owners have duties because they are actors, and actors have unquestioned duties in all phases of private law. Furthermore, this duty does not only encompass nuisance and such; it potentially applies to any societal interest of individuals (or the public) that society designates for protection. With this theory, we have a powerful justification not only for nuisance law, but also for environmental laws, shoreline preservation laws, endangered species laws, and others. Furthermore, property owners have no grounds for complaint. "Duties are imposed [in this context, as in others in private law,] because they are the natural consequences of choices [that] people make."³⁷ Actors can complain in this context no more than they can in any other.

I have to say that I like this theory a great deal. It is intuitively appealing that property owners are suddenly and noncontroversially responsible for their actions. What has seemed like an intuitive truth now has a grounding that everyone can understand. It is a brilliant argument for imposing responsibilities on landowners, in a broad spectrum of cases, for the externalities they cause. The idea that property ownership is portrayed as other-regarding for reasons as uncon-

33. See, e.g., LAURA S. UNDERKUFFLER, *THE IDEA OF PROPERTY: ITS MEANING AND POWER* (2003).

34. See, e.g., Joseph William Singer, *ENTITLEMENT: THE PARADOXES OF PROPERTY* (2000); Joseph L. Sax, *Takings and the Police Power*, 74 *YALE L. J.* 36 (1964).

35. See, e.g., Gregory S. Alexander, Eduardo M. Peñalver, Joseph William Singer, & Laura S. Underkuffler, *A Statement of Progressive Property*, 94 *CORNELL L. REV.* (special issue) 743 (2009); Ezra Rosser, *The Ambition and Transformative Potential of Progressive Property*, 101 *CALIFORNIA L. REV.* 107 (2013).

36. See, e.g., GREGORY S. ALEXANDER, *COMMODITY & PROPRIETY; COMPETING VISIONS OF PROPERTY IN AMERICAN LEGAL THOUGHT 1776-1970* (1997); Carol M. Rose, *Property as Wealth, Property as Propriety*, in *CONTEMPORARY JUSTICE: NOMOS XXXIII* 223 (John W. Chapman ed., 1991).

37. GERHART, *supra* note 1, at 167.

troversial as an analogy to tort law is a powerful and unforgettable proposition.

There is, however, an important limitation that Gerhart's analogy to tort law potentially imposes. This limitation, and whether it is justified, will be discussed in the following Section.

III. PROPERTY AS (ONLY) TORT?

Gerhart's theory of property mirrors the law of torts. One individual may make a claim against another individual when that individual has committed a wrong that ought to be addressed. Furthermore, wrongs are understood to be action-based: some kind of interference with the complainant has occurred, that is unjustified on the basis of community norms. They are wrongs because of the need for respect for each individual's freedom from interference.

As a result of this action-based, interference-based, tort-based view, allocative issues—or the issues involved in the morality of property possession itself—are expressly off the table. Gerhart separates distributive justice and corrective justice questions, and maintains that distributive questions are beyond the scope of his inquiry. He writes:

A society must determine whether the basic distribution of aggregate resources is just, as measured against a normative standard of what is deserved and needed. This is the realm of distributive justice Separately, society must determine, for any given distribution of resources, how the rights and responsibilities of owners and non-owners, now and in the future, ought to be distributed among individuals. This is the realm of corrective justice: given the distribution of resources, what is the just or morally right way for individuals to interact . . . ? . . . This book addresses only the [aspect of] corrective justice³⁸

In support of his approach, Gerhart argues that different entities are concerned with each of these questions. "Distributive justice is the realm of the collective, acting through its legislature, and can only be carried out through public law; corrective justice is within the realm of private law, which makes decisions based on notions of corrective, interpersonal morality" ³⁹

When one reads this passage, two questions immediately come to mind. First, can "distributive" and "corrective" justice be so easily separated in this context? Second, even if such separation is possible, is it desirable?

It is easy to understand how a tort-focused theory can lead one down this road. A duty of non-interference—or "private," "corrective" justice—captures all that tort law involves. But does it capture all of property?

38. *Id.* at 22 (emphasis added).

39. *Id.* at 23.

Consider, first, the limited realm of the law of torts. If someone uses his person or property to tortiously interfere with the person or property of another, a remedy (under tort law) is required. However, tort law does not concern itself with the question of “first positions.” It does not concern itself with whether either party should own the person or property he owns, or what that ownership might mean for others. Tort law assumes the legitimacy of those beginning interests, and deals only with the consequences of interference with them. Its focus is “post-entitlement,” in that sense; its concern is the later, offending transaction.

Property is much more complex than this. It involves not only tort-like interference with existing entitlements, but also whether those entitlements, themselves, should exist. And embedded in that question are issues—moral issues, in Gerhart’s terms—of the impacts of ownership on others.

In other words, we could say that the law of torts is superficial in this context. Tort law dictates that everyone’s “X” should be protected from unreasonable interference by others. But what if someone does not have equal “X”—what if someone has *no* “X”—because of prior decisions by others?

The objects of property ownership—what property “is”—might be open, endless, and available to all, as is the case with the oxygen we breathe, due process of law, or songs that are a part of the commons. It is far more likely, however, that the objects of property rights are rivalrous goods—things that are physical, finite, and nonsharable resources. In this case, it is the ownership of the resource itself that denies others their reciprocal rights. If I own that land, then you do not. If I control that water, then you do not. In such cases, the other-regarding, moral issue does not only involve the problem of interference, in a tort-like sense; it involves the prior issue of allocation.

When a good is rivalrous, we can try to separate the question of “interference” from the question of “having,” but the rule that results rings hollow. Assuring the destitute that “no property holder can unreasonably interfere with the rights of another property holder” seems patently inadequate as an evaluation of the conflicting individual interests involved. It is very difficult to avoid the obvious, underlying, distributive question.

If we are concerned, as Gerhart states, with responsibility for the well-being of others—and the objects of property are rivalrous goods—then it is impossible to ignore this dimension of things when stating a moral theory of property. Indeed, one can argue, the very theory that Gerhart presents requires that this dimension of things be considered.

Gerhart’s theory is action-based. Under his theory, it is through action that the obligations of interpersonal morality are voluntarily accrued; that “individuals must avoid activities that impose unreason-

able harm on others.”⁴⁰ Acquisition, or hoarding, or whatever we might want to call it, of physical, finite, non-sharable resources, is obviously an action by the property acquirer. As such, it is one of the “circumstances that require one individual to take into account the wellbeing of other[s].”⁴¹

Gerhart acknowledges, in the book, that actions involved in ownership decisions can trigger individual moral obligations. He writes, for instance, that “[a]n owner’s obligation to consider the well-being of non-owners . . . may . . . arise from the decision to purchase property.”⁴² This is admittedly stated in the limited context of “[p]roperty [that] comes with preexisting or customary uses,” and how those uses bind the owner when the owner is making decisions about the property.⁴³ However, if purchase actions can trigger moral obligations as trivial as noninterference with non-owners’ customary use, why wouldn’t they trigger moral awareness and moral obligations that flow from far more profound distributive issues?

Gerhart’s answer to this challenge seems to be this. The other-regardingness that his theory requires is deliberately limited in scope.⁴⁴ Through his analogy to tort, he chooses not to consider the question of moral duties owed as the result of the acquisitive or property-monopolizing action. The question of starting points, or property possession or not, is something prior to the questions that he wishes to consider. There is no doubt that questions of obligations from acquisitive actions, of the type that I am raising, are difficult. They are (as a result) often labeled “public” issues, and left to the political process. For instance, Gerhart writes that “[d]istributive justice is about the responsibilities that the community owes to individuals; corrective justice is about the responsibilities that each member of a community owes to other individuals”⁴⁵ “Distributive justice is the realm of the collective, acting through its legislature . . . ; corrective justice is within the realm of private law, [with] . . . decisions based on notions of corrective, interpersonal morality”⁴⁶

My question is this. Is this too easy? Can individuals—should individuals—be allowed off the hook so fast?

In fact, I would argue, private morality and public morality are deeply related. It is ideas of private morality that produce the individual convictions and views that, in turn, shape public policy and the ideas of public morality that we share. Citizens use their private-law rights to conceptualize what they believe to be their external or public

40. *Id.* at 149.

41. *Id.* at 5.

42. GERHART, *supra* note 1, at 173.

43. *Id.*

44. *See id.* at 22–26.

45. *Id.* at 23.

46. *Id.*

obligations. If one wants a robust public sphere which is concerned about distributive issues, it is dangerous to entrench a conceptual chasm between the rights of individuals in private law and their potential public obligations. It is dangerous to entrench the idea, among owners, that “your only obligation is this”—and then expect them to accept, without complaint or bitterness, public demands to the contrary.

A theory does not have to govern the outcome of every factual situation for it to be highly, conceptually useful. Gerhart’s theory accomplishes a great deal in the understanding of property law when applied in transactional, post-acquisition, tort-like situations. However, I would urge that its application, at the moment, is incomplete. A duty against interference with others in a post-acquisition sense is important, but misses a critical dimension of property. The action of acquisition can be as detrimental to others as the action of later interference. Both need to be part of the injunction that “individuals must avoid activities that impose unreasonable harm on others.”⁴⁷ Both are inextricably intertwined dimensions of a theory of social morality and property.

In sum, Gerhart’s theory is rooted in the idea of action as the reason for imposing duties on private actors. When this theory is extended to property, and its far more complex functions than tort, there is no good reason to exclude—and very good reasons to include—all of the actions of owners. If an individual hoards all food in a warehouse, and others are clamoring and starving outside, it is difficult to argue that the owner has not engaged in an “action-based decision” and “used his autonomy in a way that fairly implies an obligation to another.” And it is only through the recognition of such obligations in private law that we can internalize and understand the true limits of autonomy.

IV. CONCLUSION

There is a current trend in property theory to construct justificatory rationales or sets of rules for our private property regime that make as little overt reference to morality as possible. Efficiency, certainty, order, and protection of an owner’s expectations are far more likely to present the core of contemporary property theory than the idea of moral obligations. Indeed, in many circles of contemporary property theory, one often finds a reluctance—a response (at best) of annoyed tolerance—toward the linking of property and morality. There is often an unspoken conviction that as soon as property and morality are articulated together, the sharp edge of analysis is lost, and is replaced by some mushy-headed sentiment.

47. GERHART, *supra* note 1, at 149.

Gerhart's book shreds that reluctance to see property in moral terms by constructing a hard-nosed, analytical theory that ruthlessly examines just that question. The genius of Gerhart's book is that it examines property law from what we—as property lawyers and scholars—would consider to be a completely oblique angle. Obligation in property, he writes, is like obligation in tort: duties can be imposed on property owners when their actions interfere with the person or property—the “wellbeing”—of others.

This theory is brilliant in its simplicity, clarity, and instant understandability. When an owner acts in a way that impairs the interests of others, a reckoning with those harms is called for, and justified. In a single, clear, conceptual stroke, he has established a theoretical basis for the responsibilities of property owners. However, if the action of owners is to be our touchstone, then it must be considered in all of its forms. Only then will we truly grapple with all dimensions of property and morality.